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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884

No. 1251.

PHILADELPHIA LAW ASSOCIATION

THE FIRST NATIONAL BANK OF XENIA, OHIO, PLAINTIFF IN ERROR,

vs.

DANIEL M. STEWART AND MARTHA N. McMILLAN, ADMINISTRATORS OF THE ESTATE OF DANIEL McMILLAN, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED DECEMBER 29, 1884.

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1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and western division of the southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati, on the first Tuesday of April, being the first day of that month, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States of America the one hundred and eight.

Present: The Honorable George R. Sage, district judge, holding the circuit court.

Among the proceedings had were the following, to wit:

DANIEL M. STEWART and MARTHA N. MCMILLAN, Administrators of the Estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769.

Be it remembered that heretofore, to wit, on the fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, there was filed in the clerk's office of the court aforesaid, in said cause, a certain petition, clothed in the words and figures following, to wit:

2 *Petition.*

United States Circuit Court, Southern District, State of Ohio.

DANIEL M. STEWART and MARTHA N. MCMILLAN, Administrators of the Estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769.

The above-named Daniel M. Stewart and Martha N. McMillan now come and represent to the court that they are duly appointed administrators of the estate of Daniel McMillan, deceased, late of Hamilton county, Ohio, by order of the probate court of said Hamilton county, Ohio, and that they are legally qualified, and are now acting as such. That said defendant, The First National Bank of Xenia, is a duly incorporated banking organization under and by virtue of the national banking act of the United States, and against whom suits may be brought in this court.

These plaintiffs further say that said defendant, being in possession of thirty shares of the capital stock of said The First National Bank of Xenia, belonging to the said Daniel McMillan, on or about the 24th day of October, 1876, unlawfully and without warrant of law, appropriated said thirty shares of capital stock as aforesaid to its own use, and on or about said 24th day of October, 1876, sold and converted said shares into cash, receiving for the same the sum
3 of forty-two hundred dollars, which said sum said bank has, without any authority whatsoever, wholly appropriated to its own use, and refuses to account for the same, or to deliver the same over to these plaintiffs, administrators as aforesaid, as in law bound to do, although demand has been made on said bank by them for the same.

Wherefore these plaintiffs pray judgment against the said defendant for said sum of forty-two hundred dollars, with interest thereon from the 24th day of October, 1876, and for costs of suit herein expended.

GEORGE HOADLY AND
HENRY M. CIST,
Attorneys for Plaintiffs.

THE STATE OF OHIO, } ss:
Greene County, }

Daniel M. Stewart, being duly sworn, says: That he is one of the administrators of Daniel McMillan, deceased, plaintiffs herein, and that the facts set forth in the foregoing petition are true as he verily believes.

D. M. STEWART,
Administrators of D. McMillan, Deceased.

Sworn to before me and subscribed in my presence, this 4th day of October, 1878.

[SEAL.] ABNER S. BUCK,
Notary Public, Greene County, Ohio.

(Pages 4 & 5 omitted per stipulation. See page 48.)

6 *Answer.*

In the Circuit Court of the United States for the Southern District of Ohio.

DANIEL M. STEWART and MARTHA M. MCMILLAN, Administrators of the Estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769.

On the — day of April, A. D. 1876, said Daniel McMillan, then in life, was indebted to the defendant, upon a debt previously contracted in good faith, to an amount greater than the value of said certificate of stock. He, the said Daniel McMillan, being then and there unable to furnish other security, and the security of such certificate being necessary to secure the defendant from loss in the premises, he, the said McMillan, delivered said certificates, together with other securities to the defendant, as collateral security for such indebtedness.

And on or about the 24th day of October, A. D. 1876, said indebtedness being still unsatisfied and overdue, the defendant sold said stock at its full market value, and applied the proceeds thereof, as well as the proceeds of said other securities, as a credit upon said indebtedness, in due course of business; after such application there still remained due the defendant on such indebtedness a large amount of money, all which is still unpaid.

7 Defendant admits its corporate existence, and denies all and singular the other allegations of the petition not herein expressly admitted.

Wherefore defendant prays to be dismissed, and to recover its reasonable costs.

By LITTLE & SHEARER,
Def't's Att'ys.

THE STATE OF OHIO, } ss:
Greene County, }

Alfred Trader, being sworn, says: That the defendant in the above-entitled action is a corporation, and he is the cashier thereof; and that he believes the facts stated in the foregoing pleading to be true.

A. TRADER.

Signed in my presence and sworn to before me, this 19th day of October, A. D. 1878.

[SEAL.]

W. F. TRADER,
Notary Public, Greene County, Ohio.

And afterwards, to wit, on the fifth day of November, in the year last aforesaid, there was filed in the clerk's office of the court aforesaid, in said cause, a certain replication, clothed in the words and figures following, to wit:

8 *Reply.*

In the Circuit Court of the United States for the Southern District of Ohio.

DANIEL M. STEWART and MARTHA MCMILLAN, Administrators of the Estate of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769.

And now come the above-named plaintiffs, and for reply to the answers herein filed by the defendant say that they deny that said Daniel McMillan, delivered said certificates to the defendant as collateral security for the indebtedness, as set forth in answer, or otherwise, and plaintiffs deny that in law said defendant had the right to receive said certificates as such collateral security, as aforesaid.

They further deny that said defendant had the right to sell said certificates of stock, as set forth in the answer herein, and deny that said defendant had the right to apply the proceeds of sale thereof upon said indebtedness as aforesaid as a credit thereon.

GEORGE HOADLY AND
HENRY M. CIST,
Attorneys for Plaintiffs.

THE STATE OF OHIO, } ss:
Greene County, }

9 Daniel M. Stewart, being duly sworn, says that he is one of the plaintiffs herein, as administrator of Daniel McMillan, deceased, and that the facts set forth in the foregoing reply are true, as he verily believes.

D. M. STEWART.

Sworn to before me and subscribed in my presence, this 1st day of Nov., 1878.

[SEAL.] ABNER S. BUCK,
Notary Public, Greene County, Ohio.

(Pages 10 to 23 incl. omitted per stipulation. See page 48.)

24 And afterwards, to wit, on the fifth day of February, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Present: The Honorable George R. Sage, district judge, holding the circuit court.

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769. Money.

This day came the parties by their attorneys, and thereupon, to try the issues joined, a jury being called came, to wit: Samuel Kemper, Edwin Shockley, Jared Spriggs, A. T. McBeth, G. W. Willner, John W. King, Paul P. N. Pence, C. B. Crouch, W. W. V. Buchanan, J. F. Kerr, Abner Francis, and John A. Trimble, Jr., who were duly empaneled and sworn, well and truly to try the issues joined between the parties; but the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the sixth day of February, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769. Money.

25 This day again came the parties by their attorneys, also the jurors heretofore empaneled and sworn herein, and the testimony not being concluded, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

And afterwards, to wit, on the seventh day of February, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769. Money.

This day again came the parties by their attorneys, also the jurors heretofore empaneled and sworn herein, who, having heard the evidence, the arguments of counsel, and the charge of the court, retired to their room, attended by an officer of this court, to deliberate upon a verdict.

And afterwards, to wit, on the eighth day of February, in the year last aforesaid, an entry was made upon the journal of this court in said cause, clothed in the words and figrues following, to wit:

DANIEL M. STEWART *et al.*, Adm'rs
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769. Money.

This day came again the parties by their attorneys, also the
26 jurors heretofore empaneled and sworn herein, who find the issues joined to be in favor of the plaintiffs, and assess their damages by reason of the premises at the sum of six thousand & thirty-five & $\frac{40}{100}$ dollars ($6,035.40).

And afterwards, to wit, on the ninth day of February, in the year last aforesaid, there was filed in the clerk's office of the court aforesaid, in said cause, a certain motion for a new trial, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Southern District of Ohio.

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769.

The defendant now comes and moves the court here to set aside the verdict of the jury herein, because—

1. The damages assessed are excessive, appearing to have been given under the influence of passion or prejudice.
2. The verdict is not sustained by sufficient evidence, and is contrary to law.
3. For errors of law occurring at the trial, and excepted to by the defendant at the time.

a. In the admission of testimony objected to by the defendant.
b. In excluding testimony offered by the defendant.
c. In refusing to charge the jury as requested by the defendant.
27 *d.* In charging the jury as requested by the defendant with modifications.
e. In charging the jury as requested by the plaintiff.
f. Other errors to be pointed out on the argument of this motion, and especially in the charge as given.

By LITTLE & SHEARER,
Def't's Attorneys.

And afterwards, to wit, on the thirty-first day of March, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Present: The Honorable George R. Sage, district judge, holding the circuit court.

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA. } No. 2769. Money.

This day came the parties by their attorneys, and thereupon said defendant presented its certain bill of exceptions, taken at the trial herein, which, having been allowed, signed, and sealed, is hereby ordered to be filed and made part of the record in this case, which is accordingly done.

And said bill of exceptions is in the words and figures following, to wit:

28 And afterwards, to wit, on the thirty-first day of March, in the year last aforesaid, an entry was made upon the journal of this court in said cause, clothed in the words and figures following, to wit:

Present: The Hon. George R. Sage, judge.

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769.

This day came the parties by their attorneys, and thereupon said defendant presented its certain bill of exceptions taken at the trial herein, which, having been allowed, signed, and sealed, is hereby ordered to be filed and made part of the record in this cause, which is accordingly done.

And said bill of exceptions is in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio.

DANIEL M. STEWART *et al.*, Administrators &c., of Daniel McMillan, deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA. } 2769.

Be it remembered that on the trial of this cause at this, the February term of said court, A. D. 1884, before the court and a jury—present, the Hon. George R. Sage, district judge, sitting as circuit judge—the plaintiff offered evidence tending to show that twenty (20) shares of the stock in question were attached to the note transferred to Hyde as collateral therefor, and that they were not pledged
29 by McMillan, nor held by the defendant for any other purpose; also, that the remaining ten shares were deposited with the defendant, and held by the defendant for safe keeping, and not for any other purpose; and that on the afternoon of October 23rd, 1876, after the close of banking hours, defendant, through its cashier, Frank A. McClure, learned of the death of Daniel McMillan, which occurred on the morning of that day—that the books of the bank for that day, and that day's business had been closed; that thereupon McClure directed the book-keeper of the bank to enter, and said clerk did there-

upon enter $4,200 to the credit of Daniel McMillan, on his account on the books of the bank, proceeds of the sale of all the shares of the stock of the bank standing in the name of said Samuel McMillan, and to change the balance of the decedent's account on the books of the defendant so as to show the transaction; that that night, and after so causing these entries to be made, McClure, *chas*-ier, on behalf of the bank sold said shares to Judge Munger, of Xenia, and converted the money to the bank's use. Plaintiff, further to maintain the issue on its part, offered testimony tending to show that the note dated Xenia, O., April 14th, 1876, payable six months after date, made by Daniel McMillan, to the order of F. A. McClure, for $2,600.00, bearing interest at the rate of eight per centum per annum after maturity until paid, to which 20 shares of First National Bank stock was attached as collateral, was through the medium of said F. A. McClure, as defendant's *chas*-ier, discounted by one James K. Hyde; that thereafter, a few days prior to the death of
30 said McMillan, said note was paid by said McMillan to defendant bank, where the same had been deposited by said Hyde for collection, and the same with its collaterals were surrendered by Hide to the defendant, who had possession thus acquired of said collaterals at the date of the death of said McMillan.

Plaintiff further offered testimony tending to show that said Hyde, previous to the death of McMillan, left said note, with said stock attached thereto, with defendant for collection, and the said Hyde received from said bank, after notification by said McClure of the payment of said note, its certificate of deposit of the amount so paid.

Touching said promissory note and said twenty shares of stock, plaintiff introduced the deposition of said James K. Hyde, who was an invalid, and unable to attend court, tending to prove that sometime previous to the death of McMillan he left said note, with the stock attached thereto, with defendant for collection, and that on Wednesday following his death (McMillan's death) he, the said Hyde, received from said bank in payment of said note a certificate of deposit for the amount thereof; and thereupon the plaintiff, against the objection of defendant, introduced and offered the following questions and answers contained in said deposition, to wit:

Q. 10. What conversation did you have with McClure subsequent to this (subsequent to leaving said note for collection), with reference to that certificate (20 shares)?

A. He told me he had full power to transfer it at any time on the books and apply it to the payment of the note.

31 Q. 11. What was said to you by McClure at the time of the payment of the note, in reference to this certificate of 20 shares?

A. I desired to purchase it, but there was an understanding that I should hold the certificate of deposit until an administrator was appointed, when an arrangement might be made for its purchase.

Q. 13. Were you negotiating for the purchase of the certificate, or had you been?

A. I desired to purchase it, but there were no negotiations as to price, or anything of that kind. He never offered to sell to me.

Q. 14. What statement did McClure make to you at the time of the payment of the note, as to who was making payment?

A. He said the payment was made from money which was sent there by McMillan. He told me the money was left there the Wednesday previous.

Q. 15. Was any statement made to you by McClure, with reference to this certificate of stock after McMillan's death, in reference to Mrs. McMillan; if so, what?

A. He told me after McMillan's death that she preferred to keep the stock.

Q. 16. You speak of an understanding between McClure and yourself. How was this understanding arrived at?

A. I desired to purchase the stock, and he declined to sell it to me until a satisfactory arrangement could be made with the ad-
32 ministrator. This might have been a month after McMillan's death, couldn't say how long exactly.

Q. 18. State whether you ever had a conversation with McClure, with reference to the certificate of 20 shares, in which he stated the bank had any claim to the same?

A. No, sir.

To all which questions and answers defendants objected before, and as they were offered in evidence; and the court, there being no objections noted on said deposition to the form of any of said questions, overruled said objections, and permitted the same and each and all of them to be read to the jury; to which action of the court defendant then and there excepted.

And thereupon plaintiff offered in evidence the following from the deposition of said Hydes, against the objection of said defendant. Which objection, there being no objection noted in such deposition as to the form of the questions, the court overruled and permitted said testimony to be read in evidence to the jury; to all which defendant then and there excepted.

Q. 25. How long after the talk on Wednesday after McMillan's death till the other talk in which McClure told you Mrs. McMillan wished to keep the stock?

A. Two months, I presume.

Q. 26. Where did the latter take place?

A. In the bank; they all took place there.

Re-examination:

Q. 1. You speak in your cross-examination of this transaction—$2,600 note and stock as collateral being a renewal. State
33 whether or not you had not previously bought McMillan's paper, or loaned him money a number of times.

A. I had several business transactions with him, and loaned him money direct. This however was a separate transaction.

Plaintiff also offered in evidence a letter from F. A. McClure, of which the following is a copy, the foregoing testimony of Hyde being all offered in the case, tending to show that McMillan had lent or furnished the money to pay the $2,600 note, to wit:

A. HIRLING, *Prest.* Capital, $120,000. F. A. McCLURE, *Cash.*

(Cut of Bank Building.)

FIRST NATIONAL BANK, XENIA, O., *Oct.* 16*th*, 1876.

D. McMILLAN, Esq.

DEAR SIR: Mr. Mc's letter of 14th to hand, and in reply I enclose the Marshall note cancelled. I have the ctf. in my possession, and have some prospect for raising some money on same. Will write again soon; nothing new; all well.

Yours truly, F. A. McCLURE.

To the introduction of which letter the defendant objected; and the court overruled the objection, and permitted the letter to be read to the jury; to which defendant excepted.

And plaintiff having rested, defendant, to support the issues on its part, offered evidence tending to show that during the year
34 1876, and up to the date of the death of said McMillan, which occurred at 12 o'clock m., October 23, 1876, said McMillan was the owner of $3,000 of the capital stock of the defendant bank, represented by two certificates, one for 20, the other for 10 shares, which certificates, some time before and at the date of McMillan's death, were in possession of defendant, indorsed in blank by said McMillan, and that at and for a long time prior to the time of his death said McMillan was indebted to defendant in a sum in excess of the amount and value of said stock; that in April, 1876, said bank being the owner of the promissory note above mentioned, of which the following is a copy:

"(Stamp.) XENIA, O., *April* 14*th*, 1876.

"Six months after date, for value received, we, or either of us, promise to pay to the order of F. A. McClure twenty-six hundred dollars at the First National Bank of Xenia, O., with eight per cent. interest after maturity until paid.

(Signed) "D. McMILLAN.

"20 shares First National Bank stock, collateral."

Which note was indorsed in blank by the payee, F. A. McClure, individually and by him sold and delivered to one James K. Hyde, and that said McClure delivered therewith said twenty shares of stock, the certificate for which was, & before that time had been, pinned thereto as collateral security for the payment thereof.

Also, that on the day of and after McMillan's death the bank sold said thirty shares of stock to E. H. Munger for $4,200, and
35 passed the proceeds to McMillan's credit on the books of the bank. Also, that in August, prior to McMillan's death, one W. B. Marshall held a note against McMillan, secured by ten shares of said stock, and that McMillan procured a surrender of the stock, giving mortgage security in lieu thereof, he desiring to use said stock in bank. Also, that said bank had received no money from Daniel McMillan, as referred to by the witness Hyde, and that it paid Hyde

for said $2,600 note out of its own funds; and thereupon called William McGirvey, who, having testified that throughout the year 1876 he was teller of the defendant, and actively engaged in his duties as such at the bank, and that the books of the bank showed no payment of said note by McMillan, was asked by the defendant:

Q. Had you any information from any source of any money being received at the bank on or about the Wednesday preceding McMillan's death from McMillan? To which question plaintiff objected, and the court sustained the objection, and refused the question to be answered; to which ruling defendant excepted, stating before said ruling that it expected an answer in the negative.

And thereupon defendant called as a witness James C. McMillan, who, having testified that he was a brother of Daniel McMillan, and well acquainted with his financial condition during that year next preceding his death, was asked by defendant to state what that condition was to which plaintiff objected; and thereupon defend-
36 ant stated to the court that it expected to show by the witness and others that at and for more than a year prior to his death said Daniel McMillan was hopelessly insolvent, and that the fact was notorious and well known to the defendant; that he had great difficulty in procuring means to meet his interest obligations; that shortly before his death he tried to borrow money, offering as security incumbered real estate; that he could not obtain loans upon such security, but could do so on collaterals, if able to furnish them, and that being so informed did not offer to put up collaterals, and did not obtain the loans. But the court sustained plaintiff's objection & refused to permit the witness to testify at all concerning the financial condition of said McMillan at any time, or touching the matter proposed as aforesaid to be shown; to which ruling defendant then and there excepted. Defendant also offered evidence tending to show that all said bank stock had been left by McMillan with the bank as collateral to his indebtedness to it, and that it was so held at the time of said sale to E. H. Munger; that it had been endeavoring to raise money on said collaterals; that the transfer of said stock to Munger was made previous to the death of McMillan, although the proceeds were not credited to his account until afterward. Also, that said stock had been left there by McMillan to be sold or otherwise used to raise money to apply on his indebtedness to the bank, and was so held by it at the time of his death.

37 And the testimony on both sides being closed, and the court having charged the jury, and the jury having retired for consultation, the defendant requested the court to recall the jury and give to them the following additional charge, nothing having been said upon the point in the general charge, to wit: "If this stock was left with the bank by McMillan to raise money to apply on his indebtedness to the bank, and was so held by it at the time of his death, the bank would thus acquire an interest in the stock, which his death would not terminate, and the sale of the stock so held, altho' made after his death, would not be a conversion if the proceeds were duly applied to such indebtedness, and would not give the administrators of his estate the right to recover the value of the stock, and this

would be true as respects either certificate of stock." Which request and charge the court refused, and thereupon defendant excepted, and tendered this its certain bill of exceptions in the premises, and prayed the court to allow, sign, seal, & order the same to be filed and made part of the record in the case, which is done accordingly, this 31st March, A. D. 1884.

GEORGE R. SAGE, [SEAL.]
U. S. District Judge, S. D. O., sitting as Circuit Judge in said District.

38 And afterwards, to wit, on the fifteenth day of July, in the year last aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

DANIEL M. STEWART *et al.*, Administrators of Daniel McMillan deceased,
vs.
THE FIRST NATIONAL BANK OF XENIA, O. } No. 2769. Money.

This day comes the parties, and thereupon this cause came on to be heard upon the motion of said defendant for a new trial herein, and was argued by counsel; on consideration whereof, and being fully advised in the premises, the court is of opinion that said motion ought to be, and the same is hereby, overruled at the costs of said defendant. It is therefore considered and adjudged that said plaintiffs recover of said defendant the said sum of $6,035.40, their damages so as aforesaid sustained, together with interest thereon from the fifth day of February, A. D. 1884, and also their costs herein expended taxed to $——. To all which the foregoing action of the court, said defendant, by its counsel, except.

And said defendant giving notice of its intention to institute proceedings in error in the Supreme Court of the United States for the reversal of said proceedings and judgment, the amount of the supersedeas bond in that behalf is hereby fixed at $13,000.00.

39 And afterwards, to wit, on twenty-fifth day of July, in the year last aforesaid, there was filed in the clerk's office of the court aforesaid, in said cause, a certain supersedeas bond, clothed in the words and figures following, to wit:

40 Circuit Court of the United States, Southern District of Ohio.

DANIEL M. STEWART *et al.*, Adm'rs,
vs.
THE FIRST NATIONAL BANK OF XENIA.

Know all men by these presents, that we, J. C. McMillan, A. H. Baughman, L. Arnold, and Samuel M. Allison, are held and firmly bound unto Daniel M. Stewart and Martha N. McMillan, administrators of Daniel McMillan, deceased, in the sum of thirteen thousand dollars, to be paid to the said Daniel M. Stewart & Martha N. McMillan, administrators as aforesaid, or their successors, executors, or adminis-

trators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals; dated this 18th day of July, 1884.

Whereas the above-named First National Bank of Xenia has commenced proceedings in error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such, that if the above-named The First National Bank of Xenia shall prosecute its said proceedings in error to effect, and answer all damages [and] costs if it shall fail to make good its plea, then this obligation to be void; otherwise, to remain in full force and virtue.

J. C. McMILLAN. [SEAL.]
A. H. BAUGHMAN. [SEAL.]
L. ARNOLD. [SEAL.]
SAMUEL M. ALLISON. [SEAL.]

Sealed and delivered in the presence of—

_____ _____.

The above security is approved.

GEORGE R. SAGE,
District Judge, sitting as Circuit Judge of the United States, S. D. Ohio.

41 UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

I, William C. Howard, clerk of the circuit court of the United States within and for said district, do hereby certify that the foregoing is a true and correct transcript of the doings and proceedings in the case wherein Daniel M. Stewart and Martha N. McMillan, administrators of Daniel McMillan, deceased, are plaintiffs and The First National Bank of Xenia, Ohio, is defendant, as the same remains of record in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, done at the city of Cincinnati, this 29th, day of August, A. D. 1884, and of the Independence of the United States of America the one hundred and ninth.

[SEAL.] WILLAM C. HOWARD,
Clerk U. S. Circuit Court, S. D. O.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court, before you, between Daniel M. Stewart and Martha N. McMillan, administrators of the estate of David McMillan, deceased, and The First National

Bank of Xenia, O., a manifest error hath happened, to the great damage of the said The First National Bank of Xenia, Ohio, as by its complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22d day of August, 1884, in the year of our Lord one thousand eight hundred and eighty-four.

[SEAL.] WM. C. HOWARD,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, southern dist. of Ohio. No. 2769. David McMillan's Adm'rs *vs.* First Nat'l Bank of Xenia. Writ of error. Filed August 22d, 1884. Wm. C. Howard, clerk. Lloyd & Taft. Little & Shearer.

43 THE UNITED STATES OF AMERICA, *ss:*

To Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein The First National Bank of Xenia, Ohio, is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this 22d day of August, in the year of our Lord one thousand eight hundred and eighty-four.

STANLEY MATTHEWS,
Associate Justice.

44 [Endorsed:] 138. 8 | 22 | 84—1.30 p. m. United States circuit court, southern dist. of Ohio. No. 2769. David McMillan's Administrators *vs.* First Nat'l Bank. Citation to defendant in error. Filed Aug. 28th, 1884. W. C. Howard, clerk.

Rec'd this writ at Cincinnati, O., Aug. 22nd, 1884, 1.30 p. m., and served the same in Xenia, Greene county, O., as follows: On the within named Daniel M. Stewart, by leaving a true copy hereof with

his wife at his usual place of residence Aug. 27th, 1884, at 10.20 a. m; as to the within named Martha N. McMillan, she was not found in my district.

LOT WRIGHT, *U. S. M.*,
By C. E. TWIFORD, *Dep.*

Service	2 00
Copy	50
65 miles	3 90
	$6 40

45 *Petition.*

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF XENIA, O., Pl'ff,
v.
DANIEL M. STEWART *et al.*, Adm'rs of the Estate of Daniel McMillan, dec'd, Def'ts.

Plaintiff in error complains of defendants in error, for that the latter at the February term of the circuit court of the United States for the southern district of Ohio, A. D. 1884, recovered a judgment against it, in a cause wherein said defendants in error were plaintiffs and this plaintiff was defendant, a duly authenticated transcript of the record in which cause is herewith filed and made part hereof.

The plaintiff in error avers there is error in said record and proceedings, as follows:

1. Said circut court erred in overruling said motion for a new trial.
2. In rendering judgment for the plaintiffs instead of for defendant.
3. In admitting certain testimony against the objections of said defendant.
4. In refusing to admit testimony offered by defendant below.
5. In its charge to the jury.
6. In refusing to charge as requested by defendant below.

46 Wherefore plaintiff in error prays that said judgment may be reversed, and that it be restored to all things it has lost by reason of the premises, & for other relief.

JOHN LITTLE,
Att'y for Pl'ff in Error.

47 (Endorsed:) Supreme Court of the United States. The First Nat'l Bank of Xenia, pl'ff *v.* Daniel M. Stewart and another, administrators of the estate of Dan'l McMillan, dec'd, def'ts. Petition. John Little, Xenia, O.

The issue and service of process in the within entitled case is hereby waived, & our appearance thereto voluntarily entered, this December —, A. D. 1884.

HOADLY, JOHNSON & COLSTON,
Att'ys for Def't in Error.

48 Supreme Court United States.

THE FIRST NATIONAL BANK OF XENIA, O., Pl'ff,
vs.
DANIEL M. STEWART *et al.*, Administrators of the Estate of Daniel McMillan, dec'd, Def't-. } No. ——.

We agree that so much of the record as relates to the former proceedings in error in the Supreme Court, and which is indicated by pencil lines drawn through it, does not relate to the proceedings involved in this proceeding in error, and need not be printed. The clerk is therefore directed to omit the printing thereof.

JOHN LITTLE,
Att'y for Pl'ff in Error.
EDGAR M. JOHNSON,
Att'y for Def't in Error.

(Endorsed:) Supreme Court U. S. 1884, October term. No. 1251. The First National Bank of Xenia, O., pl'ff in error *vs.* Daniel M. Stewart *et al.* Stipulation to omit portions of record. Office Supreme Court U. S. Filed Dec. 30, 1884. James H. McKenney, clerk.

Endorsed on cover: S. Ohio C. C. U. S. No. 1251. The First National Bank of Xenia, Ohio, plaintiff in error, *vs.* Daniel M. Stewart and Martha N. McMillan, administrators of the estate of Daniel McMillan, deceased. Filed 29th December, 1884.

114-226

Office Supreme Court U. S.
FILED
MAR 9 1896
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES

1257

THE FIRST NATIONAL BANK, OF XENIA,

vs.

DANIEL M. STEWART, ET AL., ADMINISTRATORS, ETC.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN LITTLE, of Little & Shearer, Counsel for Plaintiff in Error.

Supreme Court of the United States.

The First National Bank, of Xenia,

vs.

Daniel M. Stewart, et al., Administrators, Etc.

BRIEF FOR PLAINTIFF IN ERROR,

JOHN LITTLE, of Little & Shearer, Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK, OF XENIA,

vs.

DANIEL M. STEWART, ET AL., ADMINISTRATORS, ETC.

BRIEF FOR PLAINTIFF IN ERROR.

This case is before this court for the second time.

A statement of the nature of the action below is made in the former error case (107 U. S. 676) and need not be repeated.

In the former trial the main issue of fact was as to whether the bank stock was left by McMillan as collateral for a *present* or a *past* loan to him by the bank. On that issue the court charged the jury erroneously. A new trial resulted.

On the second trial the claim was set up that McMillan furnished the money to the bank just before his death where-

with to pay the loan for the security of which the stock, or the greater part thereof, was left as collateral.

A glance at the record will disclose that the intestate, McMillan, died October 23, 1876, at 12 o'clock, M. At that time he had thirty shares of stock in the bank, indorsed in blank;—a ten-share and a twenty-share certificate. The twenty share certificate was attached as collateral to a $2,600 note made to the order of F. A. McClure (Cashier) dated April 14, 1866, and due at six months, (Record p. 9). This note was sold to James K. Hyde, shortly after its date, by the bank He held it and left it with the bank for collection shortly before its maturity. On Wednesday following McMillan's death—he died on Monday—the bank paid Hyde by issuing him a certificate of deposit for the amount of the note.

It was claimed by the plaintiffs that McMillan furnished the money to the bank wherewith to pay this note.

It was sought to establish this through the testimony of James K. Hyde, (whose deposition was read, he being sick,) by showing the verbal statements of McClure made days *after* the alleged furnishing of the money by McMillan, and without any reference to, or examination of the books of the bank,

The declarations of McClure at the time Hyde received the certificate of deposit, and *subsequently*—for some were made *weeks* afterwards—relating to the ownership of the

certificates. (Record pp. 7 and 8) we claim were incompetent being the mere declarations of an agent concerning a past transaction.

Wharton's Ev. Sec. 415 and note 6; Morse on Banking (Ed. of 1870) p. 179 180; 37 Me. 519; 2 Hill 445; 10 Vesey 123; 52 Me. 531; Anderson v R. R. 54 N. Y., 334; 1 Greenleaf on Ev. Sec. 113; Luby v R. R., 17 N. Y., p 341; Baptist Church v R. R., 28 N. Y. 153; Packet Co v Clough, 20 Wall 540; Burnside v R. R., 47 N. H., 554; R. R. v Mara, 26 O. S. R. 185.

It is one of the facts in the case that the bank had sold the stock to Judge Munger for $4,200 the very day McMillan died. The sale is pleaded and there was no dispute about it. On what grounds can it be claimed that the declarations of McClure were competent, made long afterwards to the effect that the bank was holding the stock for Mrs. McMillan, and that Hyde could hold the certificate of deposit he received till an administrator could be appointed "when an arrangement might be made for its purchase."

On what theory was it competent to show that Mrs. McMillan had stated to McClure "that she preferred to keep the stock"?

Why was it allowable to show the declination of McClure to sell Hyde the stock a month after McMillan's death, "until a satisfactory arrangement could be made with the administrator." (p. 8) This was tantamount to McClure saying that the bank had the stock on hand belonging to the

estate and subject to its order. It was intended by the plaintiff, and doubtless was received by the jury as corroborative of the claim that McMillan had sent the money to pay the Hyde note, and that the bank therefore held the stock freed from its claims. This testimony was obviously prejudicial to the defendant, although by the pleaded and proven facts in the case, as stated, the bank did not hold the stock a day after McClure died. And all this testimony was the mere statement of an agent concerning past transactions and therefore incompetent.

See authorities above cited

2. The books of the bank showed no payments of the Hyde note by McMillan, (p. 10). There was no record evidence of such payment. There was only the statement of McClure to Hyde after McMillan's death. McClure was dead—having died in 1877, (though this may be a statement outside the record) The bank sought to disprove the alleged payment by showing that the teller, Mr. McGervey, (p. 10) who was at the bank during the period covered by these transactions, had no information from any source that such payment was made, but was precluded by the court. We think this was error. The teller's lack of information would not be conclusive of non-payment, of course; but how much weight it would have would depend upon how much he had to do with the receiving of money paid the bank. This could have been developed had the inquiry been allowed. An objection to this class of testimony goes to its weight —not to its competency—, we submit.

Wharton's Ev. Sec. 415 and notes (2nd ed.)

Still v. Huidekopers, 17 Wall. 384.

3. Again, to negative the claim of payment of the Hyde note by McMillan, the bank offered to prove the utter, hopeless and notorious insolvency of McMillan for a year preceding his death; that he had great difficulty to raise money to meet his interest obligations; that he had been endeavoring to raise money on his encumbered real estate, but failed, etc., etc., (p. 10,) but the court refused to allow the testimony to be heard. We think this was error. How else could such a declaration of payment be met? Say (which was the fact) there is no record of payment. No one saw it made, so far as disclosed. No receipt; no trace whatever. There is the mere alleged declaration of the cashier *after* the fact that it had been made, and he is dead. How could the declaration be met? How else or how better than to show the alleged payor was not in a financial condition to pay? His insolvency might not be conclusive, to be sure, but it is a proper circumstance to be considered in determining *the fact* of payment. To argue that, if payment was made, it is immaterial whether McMillan was insolvent, is to beg the question. That is to assume the fact to be proven as already established.

Waddell v. Elmendorf, 10 N. Y., 170.

Farmers' Bank v. Leonard, 4 Harr. (Del.) 536.

Wharton's Evidence, Sec. 1364.

4. We submit whether under the pleadings, and notwithstanding the verdict, the defendant is not entitled to a judgment. It is admitted by the pleadings that McMillan was indebted to the bank at the time of his death more than the value of this stock. The stock being in the hands of the bank endorsed by McMillan in blank, we submit whether the law will not make the application of its value to the indebtedness.

5. The introduction of the McClure letter (p. 9) we régard as error. It was but a fragment of a correspondence. There is nothing to show it was written for the bank. It was simply "a letter from F. A. McClure," and not from him as *cashier*, so far as disclosed.

Respectfully submitted,

JOHN LITTLE,

Of Little & Shearer,

Counsel for Plaintiff in Error.

114-224
114-224

Robert Clarke & Co., Printers, Cincinnati.] [*March, 1883.*

IN THE

Supreme Court of the United States.

The First National Bank of Xenia, Ohio,
Plaintiff in Error,

vs.

Daniel M. Stewart and Martha N. McMillan, Administrators of the Estate of Daniel McMillan, Deceased,
Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Ohio.

By HOADLY, JOHNSON & COLSTON,
Their Attorneys.

IN THE

Supreme Court of the United States.

Robert Clarke & Co., Printers, Cincinnati.] [*March, 1885.*

IN THE

Supreme Court of the United States.

The First National Bank of Xenia, Ohio,
Plaintiff in Error,

vs.

Daniel M. Stewart and Martha N. McMillan, Administrators of the Estate of Daniel McMillan, Deceased,
Defendants in Error.

ARGUMENT FOR DEFENDANTS IN ERROR.

Error to the Circuit Court of the United States for the Southern District of Ohio.

By HOADLY, JOHNSON & COLSTON,
Their Attorneys.

This case is now before the Court upon the question whether the Court below erred in the admission and exclusion of testimony in respect to the competency of the same.

This case was before this Court at the spring term of 1883, upon a question of law, which subsequently discovered testimony disclosed not to be applicable to the case, and is now here upon questions arising upon the facts of the case.

The petition was filed herein by the administrator of Daniel McMillan, deceased, to recover forty-two hundred dollars, with interest from October 24, 1876, from the First National Bank of Xenia, by reason of the bank on that day converting thirty shares of its own capital stock, which at that time belonged to the estate of Daniel McMillan, then deceased. (Record, page 1.) The answer (Record, page 2) claimed that in April, 1876, Daniel McMillan, then in life, was indebted to the defendant, upon a debt previously contracted in good faith, to an amount greater than the value of said certificates of stock; that being unable to furnish other security, and the security of the said certificates of stock being necessary to secure the defendant from loss in the premises, he, McMillan, delivered said certificates of stock, with other securities, to the defendant, as collateral security for the debt, and that on October 24, 1876, the indebtedness being still unsatisfied and overdue, the defendant sold the stock at its full value, and applied the proceeds thereof, and the proceeds of said other securities, as a credit upon said indebtedness, in due course of business, leaving a large amount due to the defendant on such indebtedness, which still remains unpaid. The reply (Record, page 3) denies that the certificates were delivered to the defendant, as collateral security for the indebtedness, as set forth in the answer, and denies that the defendant had the right to receive said certificates as such collateral security, and denies that the defendant had the right to sell said certificates, as set forth in the answer, and denies that the de-

fendant had the right to apply the proceeds of the sale upon said indebtedness.

Trial was had before Judge Sage and a jury, and a verdict was rendered for the plaintiff, (Record, page 5) for the sum of $6,035.40 damages. It appears by the bill of exceptions (Record, page 6 and following), that the plaintiff upon the trial introduced testimony tending to show that Daniel McMillan was the owner of two certificates of stock in the First National Bank of Xenia, Ohio, one for twenty shares and the other for ten shares; that the certificate for twenty shares of stock was pledged as security for the payment of a note for $2,600, dated April 14, 1876, held by one James K. Hyde, the note having been discounted by him, and said note, a few days prior to the death of said McMillan, was paid by McMillan to the defendant bank, where the same had been deposited by said Hyde for collection, at which time said note and its collaterals were surrendered by Hyde to the defendant bank, which had possession thus acquired of said collaterals at the date of the death of said McMillan.

As to the certificate of the ten shares of stock the bill of exceptious discloses that upon the trial testimony was introduced (Record, page 9) tending to prove that this certificate had been held by one W. B. Marshall as collateral security for a note of Daniel McMillan's, owned by him, and that McMillan procured a surrender of the stock, taking up his note by giving mortgage security in lieu thereof, in August, 1876.

I.

AS TO THE TWENTY-SHARES CERTIFICATE.

The defendant below objected to the introduction of the testimony of Mr. Hyde, claiming the same to be incompetent (Record, pages 7, 8), which objection the Court overruled. The testimony was offered as part of the *res gestæ*, and as such we claim was properly admitted by the Court below. The original transaction with reference to the McMillan $2,600 note, whereby Mr. Hyde became the owner thereof, had taken place with the defendant bank in April, 1876. The note, with its collaterals, had been left by Mr. Hyde with the defendant bank a short time previous to the death of McMillan, October 23, 1876, for collection, and Mr. Hyde was testifying to statements made by the cashier of the defendant bank prior to the completion of the transaction in regard to matters connected therewith. These statements were with reference to the money sent by McMillan to pay his note, and to release his certificate of stock pledged as security thereto, and were made before the money was paid to Hyde. These, we claim, formed part of the *res gestæ*, and as such were admissible. The testimony was competent in another view. Mr. Hyde was holding collaterals, for the proper care and disposition of which he was responsible, and was interested in knowing where the money came from that he received, in order that the stock pledged might be properly surrendered to McMillan on payment by him of his note.

There can be no doubt but that the testimony shows that Mr. Hyde was dealing with the defendant bank in regard to a matter strictly within the scope of the powers of the corporation, and his dealings were with the chief executive officer of the bank. Certainly the statements and admissions made to him in regard to the transaction at this time by the cashier of defendant bank are competent as against the claim made by the bank in this suit with reference to the subject-matter of the transaction.

The legal status of the cashier of a bank is well defined in the case of *Bank of Kentucky* v. *Schuylkill Bank*, 1 Parsons' Select Cases, 180.

On page 240 the Court say, in speaking of the cashier of a bank:

"He is a statute officer, not of the directory, but of the corporation, lawfully empowered to carry the contracts of the corporation in execution, as the directory are lawfully authorized to make them, when acting within the sphere of their authority, derived from the corporation."

And later, in same case:

"Although a bank corporation is compelled by the incorporeal nature of its essence to act by others, yet when these are part of its organic machinery, like its cashier, it is as much responsible for their omission and commission as is a natural person who employs assistants in the execution of any commission."

The cashier is the chief executive officer of a bank. *United States* v. *City Bank of Columbus*, 21 Howard, 356; *Bissell* v. *First National Bank*, 69 Penn. St. 415.

The statements and admissions of the cashier in re-

regard to matters coming within the ordinary scope of his authority are binding on the bank.

In *Cochico National Bank* v. *Haskill*, 51 New Hampshire, 116, on page 121 it was held:

"The acts of a cashier done in the ordinary course of business actually confided to such an officer may be regarded *prima facie* as coming within the scope of his duty. He is held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions. He is the financial officer of the bank."

And again on same page:

"In short, he is considered the executive officer through whom and by whom the whole moneyed operations of the bank in paying or receiving debts or discharging and transferring securities are to be conducted."

See also *Fleckner* v. *The Bank of U. S.*, 8 Wheat. 338.

Gould v. *Cayuga Co. Nat. Bank*, 56 Howard Practice, 505.

Merchants' Bank v. *Marine Bank*, 3 Gill, 96.

The general principle is sustained by very many decisions arising in cases where corporations other than banks are interested.

One where the Court goes very thoroughly into the question, is the case of *C. B. & Q. R. R. Co.* v. *Coleman*, 18th Illinois 297. The rule there is laid down applicable to the president of a railroad, and the language there used applies with equal force to the cashier of a bank, each being in law the chief executive officer of their respective corporations.

On page 299, the Court says:

"The business transactions appertaining and incident to the conduct of its affairs, must of necessity be extensive and multifarious, incapable of execution by a board of directors, and requiring a chief officer and executive head, with power to act in the transaction of the ordinary business of the corporation, as the exigencies of that business may require. The business of such corporation can be carried on only through their officers, agents, and servants. Through them only can they act or speak, and the president is treated by the public, and made by usage, the chief officer and executive head of the corporation. Through him numerous every day affairs of the corporation are transacted, and such acts as are incident to the execution of the trust reposed in him of an ordinary character arising in the routine of business, such as custom or necessity has imposed upon the office he may perform for the corporation, without special or express authority."

And on same page:

"Unless they"—corporations—"may be bound in the ordinary affairs of the corporation by the acts and admissions of their officers, so far as relate to the business usually transacted through such officers, they would enjoy an immunity incompatible with the rights of individuals and destructive of the object of their creation. The president of a railroad company is treated by common usage as its head—an officer within and a part of the corporation; a mere artificial person incapable itself of acting or speaking—and admissions of such officer made in the execution of the duties imposed upon him, and concerning a matter upon which he is called to act, and which matter is within the scope of the authority usually exercised by him, are evidence against the corporation."

And see the authorities there cited.

Also the case of *Sewanee Mining Co.* v. *McMahon*, 1 Head (Tenn.) 582.

II.

AS TO THE TEN SHARES CERTIFICATE.

The testimony offered by *the defendant* tended to prove (Record, page 9) that in August, 1876, McMillan redeemed this certificate before then pledged to one W. B. Marshall. Plaintiff, as tending to show that the bank had no claim on *that* certificate, offered in evidence a letter of October 16th, 1876—one week before the death of McMillan—written and signed by the cashier of defendant bank. (Record, page 9). To this the defendant objected, which objection was overruled and defendant excepted, and now predicates error in this Court thereon.

The letter was offered to prove that the defendant bank had knowledge of the facts as stated in the letter, and to this extent we claim it was competent evidence.

In the case of *Commercial Bank* v. *Wood*, 7th Watts and Sergeant, 89, it was held that a letter signed by a third person, but written by the president of the bank, was evidence for the plaintiff, to prove a knowledge in the bank, of the facts stated in the letter.

But we claim on another principle of law, that the letter is competent evidence against the defendant bank. The defendant in the Court below sought to obtain full advantage of the acts of its cashier after notice of the death of McMillan with reference to the stock which now forms the subject matter of this controversy. The acts and declarations of this cashier in relation to this particular stock

tending to disprove the claim set up as a defense by the defendant's bank, are certainly competent evidence against the bank.

There are three other objections to the ruling of the Court below as disclosed by the record. The first one relates to the offer of the defendant bank to prove that Mr. McGirvey, a teller in the bank, had *no information* from any source that money had been received at the bank on or about the Wednesday preceding McMillan's death from McMillan. (Record page 10.)

Ten thousand witnesses can be called to prove that they have no information of an existing fact, but that proves nothing one way or the other as to the existing fact, and the objection was properly sustained.

2. The defendant then offered to prove that McMillan was hopelessly insolvent for more than a year prior to his death, which being objected to, the Court sustained the objection (Record, page 10), and defendant excepted.

This is about on a par with the effort to prove no information, as above. It would only be negative testimony at best, and would prove no existing fact if admitted, and directly proves nothing except by inference, which is clearly incompetent and irrelevant.

3. The third and last exception, as shown by the record, is that taken by defendant bank to the refusal of the Court to recall the jury, and give to them an additional charge (Record, page 10), after the jury had retired for consultation.

This was a matter resting in the sound discretion of

the Court, and the record fails to disclose any abuse of this discretion on the part of the Court.

For these reasons we insist that the judgment below should be affirmed.

Respectfully submitted.

GEORGE HOADLY,
EDGAR M. JOHNSON,
EDWARD COLSTON,
of HOADLY, JOHNSON & COLSTON,
Attorneys for Defendants in Error.

CINCINNATI, *March* 3, 1885.

114-224

Supreme Court of the United States,

OCTOBER TERM, 1884.

The First National Bank of Xenia,
PLAINTIFF IN ERROR,
against
Daniel M. Stewart, Administrator of the estate of Daniel McMillan, deceased,
DEFENDANT IN ERROR.

NO. 1251.

Motion to Advance.

And now comes Daniel M. Stewart, Administrator of the estate of Daniel McMillan, deceased, Defendant in Error, and moves the Court to advance the hearing of the above entitled cause, because he says said cause comes within the Fourth Section of Rule Twenty-six of this Court, having once been adjudicated upon its merits in this Court, at the October Term 1882, as will more fully appear by the decision thereof reported in 107, United States, page 676, National Bank of Xenia vs. Stewart.

GEORGE HOADLY,
EDGAR M. JOHNSON,
EDWARD COLSTON,
Attorneys for Defendant in Error.